(4)

Supreme Court, U.S.
FILED
APR 17 1996
CLERK

Docket No. 95-1489

In The
Supreme Court of the United States
1995 October Term

MARK DEAN GODDARD,

Petitioner,

v.

KANSAS DIRECTOR OF TAXATION ON ASSESSMENT OF MARIJUANA AND CONTROLLED SUBSTANCES TAX,

Respondent.

ON PETITION FOR CERTIORARI TO THE KANSAS SUPREME COURT

RESPONDENT'S APPENDIX

BY RESPONDENT KANSAS DEPARTMENT OF REVENUE

Richard E. Oxandale,
General Counsel
Kansas Department of Revenue

Joseph Brian Cox, Attorney
Kansas Department of Revenue
Legal Services Bureau
Docking State Office Building
Topeka, Kansas 66612-1588
(913) 296-2381
Counsel of Record for Respondent Kansas Department of Revenue

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36 pp

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

IN THE MATTER OF THE APPEAL OF
MARK DEAN GODDARD FROM AN
ORDER OF THE DIRECTOR OF
TAXATION ON ASSESSMENT Doc. No. 92-16575-DT
OF MARIJUANA AND CONTROLLED
SUBSTANCES ATTACKS.

AND

IN THE MATTER OF THE APPEAL OF
ROBERT LEE FOSTER FROM AN
ORDER OF THE DIRECTOR OF
TAXATION ON ASSESSMENT Doc. No. 92-16576-DT
OF MARIJUANA AND CONTROLLED
SUBSTANCES TAX.

MOTION FOR WAIVER OF BOND

COME NOW, the above referenced taxpayers, by and through their attorney, Richard W. Parker, and move the Court of Appeals for an Order waiving the requirement of bond pursuant to Supreme Court Rule 9.03(b) and in support thereof, states and alleges as follows:

1. That the Department of Revenue assessed against each of the taxpayers named herein a tax based upon K.S.A. 79-5201, et. seq., Marijuana and Controlled Substances, in the amount of $1,144,460.00.

2. That pursuant to Supreme Court Rule 9.03(b), the required bond is to be in the amount of 125% of the tax.

3. That it is impossible for the taxpayers to pay in excess of $1.4 million dollars as a bond in order to appeal the findings of the Board of Tax Appeals.

4. That the Department of Revenue has previously seized just over $10,000.00 from taxpayers shortly after the assessment.

5. That the taxpayers would request that the $10,000.00 in the possession of the Department of Revenue serve as the bond necessary for purposes of appealing the tax assessment.

6. That this appeal is based upon the constitutionality of the Controlled Substances Tax Act.

7. That the Board of Tax Appeals does not have the authority to rule on constitutional issues.

8. That denying the taxpayers the right to appeal the constitutionality of the statute merely because of the taxpayers inability to post the bond would be prejudicial, constitute irreversible harm, and is a perfect example of a true miscarriage of justice.

WHEREFORE, the taxpayers move for an Order from the Court of Appeals waiving bond in this appeal and for such other relief as the Court may deem to be just and equitable.

RICHARD W. PARKER, P.A.

By: /s/_____

Richard W. Parker—#10470
7600 W. 110th St., Ste. 104
Overland Park, KS 66210
913-451-1980
ATTORNEY FOR TAXPAYERS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Motion for Waiver of Bond was served upon the following parties via U.S. Mail, postage prepaid, on this 7th day of April, 1995:

Mr. Jack Shriver, Chairman
Board of Tax Appeals
Docking State Office Building
915 S.W. Harrison
4th Floor
Topeka, KS 66612

Director of Taxation
Docking State Office Building
915 S.W. Harrison
3rd Floor
Topeka, KS 66612

Brian Cox, Attorney
Legal Services Bureau
Kansas Dept. of Revenue
Docking State Office Building
915 S.W. Harrison
Topeka, KS 66612-1588

Mark Burghart
General Counsel
Dept. of Revenue
Docking State Office Building
915 S.W. Harrison, 2nd Flr.
Topeka, KS 66212

Carl Edwards, Attorney
Board of Tax Appeals
Docking State Office Building
915 S.W. Harrison
4th Floor
Topeka, KS 66612

/s/
Richard W. Parker

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

IN THE MATTER OF THE APPEAL OF
MARK DEAN GODDARD, FROM AN ORDER
OF THE DIRECTOR OF TAXATION
ON ASSESSMENT OF MARIJUANA
AND CONTROLLED SUBSTANCES TAX

AND Doc. No. 95-63903

IN THE MATTER OF THE APPEAL OF
ROBERT LEE FOSTER, FROM AN ORDER
OF THE DIRECTOR OF TAXATION
ON ASSESSMENT OF MARIJUANA
AND CONTROLLED SUBSTANCES TAX

SUGGESTIONS IN SUPPORT OF APPELLANTS' MOTION TO WAIVE BOND

COME NOW Appellants in the above entitled case, by and through counsel, Richard W. Parker, and pursuant to the courts orders of May 5, 1995, and May 18, 1995, tender the following suggestions in Support of Appellants' Motion to Waive Bond.

Procedural History

On March 21, 1988, Mark Goddard and Robert Foster pled nolo contendere to the charges of attempted possession of cocaine and sale of cocaine. On July 15, 1988, the Kansas Department of Revenue issued a "Notice of Assessment of Tax Upon Marijuana and a Controlled Substance" to Robert Foster in the total amount of $1,144,460.00. A like notice of assessment in an identical amount was issued by the Department of Revenue on September 29, 1988, to Mark Goddard.

The tax rate assessed upon the substances was $3.50 per gram on marijuana and $200.00 per gram of cocaine. The

alleged amount of the substances upon which the tax was assessed as against each taxpayer was 63.3 grams of marijuana and 2,859.2 grams of cocaine.

On April 23, 1992, a formal hearing was held by the Department of Revenue. On September 15, 1992, the Administrative Hearing Officer designated by the Director of Taxation, Jim Weisgerber, entered an Order denying the Appeal of the taxpayers and upholding the assessment of the department.

On October 12, 1992, the taxpayers filed a Notice of Appeal to the Board of Tax Appeals. On June 1, 1993, a prehearing conference was held, and on June 1, 1994, a Formal Hearing was conducted in the above-entitled matter before the Board of Tax Appeals. On January 30, 1995, the Board of Tax Appeals entered an order affirming assessment of the tax by the Department of Revenue. On February 20, 1995, the taxpayers filed a Petition for Reconsideration, which was denied by the Board of Tax Appeals in its Order Reconsidering the Board's prior Order of January 30, 1995. On April 7, 1995, the taxpayers filed their Notice of Appeal/Petition for Judicial Review in the Court of Appeals.

Waiver of Bond

The instant appeal is taken from the Board of Tax Appeals to this Court pursuant to K.S.A. 74-2426. Kansas Supreme Court Rule 9.03 (b) provides in pertinent part:

> The statutory bond shall accompany the notice of appeal and be filed with the clerk of the appellate courts. Unless otherwise requested, the bond shall be in the amount of 125% of the tax assessed and shall be approved by the clerk. If a bond in a lesser amount is requested, the appellant shall submit a motion pursuant to Rule 5.01 with the notice of appeal in lieu of the bond.

On April 7, 1995, pursuant to Supreme Court Rule 5.01, appellants filed a Motion for Waiver of Bond. On May 5, 1995, this Court denied Appellants' Motion and instructed the parties to address the issue of an appropriate bond by written response.

The instant appeal involves, in part, the constitutionality of the Marijuana and Controlled Substances Act, K.S.A. 79-5201 *et seq.* in view of the U.S. Supreme Courts recent decision in *Department of Revenue of Montana v. Kurth Ranch, et.al.*, 1994 W.L. 237615 (U.S.)

In *Kurth*, the Court struck down Montana's Dangerous Drug Tax on the grounds that the assessment was so excessive that it constituted a punitive "tax." Similarly, in the present matter, appellants contend that the Kansas Marijuana and Controlled Substance Act violates the 5th and 14th Amendments to the United States constitution, and under *Kurth*, supra, the assessment regimen under the Act is prohibited by double jeopardy, res judicata and collateral estoppel.

The Board of Tax Appeals determined that the *Kurth* decision, supra, was not applicable to the present matter, noting that the Board is specifically prohibited from ruling on constitutional issues as stated in *Felton Truck Line v. State Board of Tax Appeals*, 183 Kan. 287, 293, 327 P.2d 836 (1958). The Board went on to note that should it decide to apply *Kurth*, it would have to find that Article 52, of Chapter 79 of the Kansas Statutes Annotated is unconstitutional, which under long-standing Kansas law, it is specifically prohibited from doing.

On January 30, 1995, the Board entered an Order denying the taxpayers' appeals, and on March 6, 1995, denied the taxpayers' Petition for Reconsideration. Pursuant to K.S.A. 74-2426, Appellants perfected the instant appeal from the excise tax assessment by the Department of Revenue.

Under Kansas law, the assessment of taxes, penalties and interest by the Director of Taxation is presumed to be correctly determined and assessed. K.S.A. 79-5205(c) provides, in pertinent part,

> The tax penalties and interest assessed by the director of taxation are presumed to be valid and correctly determined and assessed. *The burden is upon the taxpayer to show their incorrectness or invalidity.* (Emphasis added).

Therefore, under K.S.A. 79-5205, the burden of proving that the assessment is invalid falls squarely on the shoulders of appellants.

As the Board of Tax Appeals is unable to determine the constitutionality of the Kansas Marijuana and Controlled Substances Act, under K.S.A. 79-504, in order to overcome the presumption of the validity of the assessment set forth in K.S.A. 79-5205, the taxpayers had to appeal the instant matter to this court.

As previously stated, under Kansas Supreme Court Rule 9.03 (b), in order to perfect an appeal, a bond in the amount of 125% of the tax assessed must be posted. In the present matter, the assessed tax is $1,144,460.00 for each appellant. Therefore, in order to appeal this matter, appellants are required to post a bond of $1,430,575.00. Appellant Robert Foster is employed as an over-the-road truck driver, and appellant Mark Dean Goddard, is employed as a building contractor. Given appellants' occupations, they are unable to pay in excess of $1.4 million dollars as a bond in order to appeal the findings of the Board of Tax Appeals.

Taking into consideration the fact that Appellants have the burden of proving that the assessment of the subject excise tax is invalid, and under Kansas law, an appeal of this

constitutional issue must be made to this court, requiring appellants to pay over $1.4 million to perfect this Appeal would be a denial of due process. Somewhat akin to criminal law, the presumption under K.S.A. 79-5205 (c) is one of guilty unless the taxpayer is able to prove innocence. Requiring appellants to pay over a million dollars in order for an opportunity to prove their innocence would deprive these taxpayers of the due process of law to which they are entitled under both the Kansas and the United States Constitutions. Denying Appellants the right to appeal the constitutionality of K.S.A. 79-5201 *et seq.* merely because of the taxpayers inability to post the bond would constitute irreversible harm.

Under Supreme Court Rule 9.03, this Court has discretion to modify the required bond. Balancing the extremely limited financial resources of Appellants and Appellants constitutional right to appeal, the Appellants respectfully request this Court to enter an order waiving bond in this appeal.

In the alternative Appellants respectfully request that the approximately $10,000.00 cash seized by the Department of Revenue from the taxpayers shortly before the subject assessment, serve as the bond necessary for purposes of appealing the tax assessment.

To do otherwise would serve only to deny the taxpayers the constitutionally guaranteed due process of law to which they are entitled, merely because of their financial restraints.

WHEREFORE, Appellants respectfully request this Court to enter an Order waiving bond in this appeal and for

such other and further relief as the Court deems just and equitable.

RICHARD W. PARKER, P.A.

By: /s/ FOR

Richard W. Parker—#10470
7600 W. 110th St., Ste. 104
Overland Park, KS 66210
913-451-1980
ATTORNEY FOR TAXPAYERS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Suggestions in Support of Appellants Motion for Waiver of Bond was served upon the following parties by depositing same in the U.S. Mail, postage prepaid, on this 21st day of June, 1995:

Mr. Jack Shriver, Chairman
Board of Tax Appeals
Docking State Office Building
915 S.W. Harrison
4th Floor
Topeka, KS 66612

Director of Taxation
Docking State Office Building
915 S.W. Harrison
3rd Floor
Topeka, KS 66612

Brian Cox, Attorney
Legal Services Bureau
Kansas Dept. of Revenue
Docking State Office Building
915 S.W. Harrison
Topeka, KS 66612-1588

Mark Burghart
General Counsel
Dept. of Revenue
Docking State Office Building
915 S.W. Harrison
Topeka, KS 66212

Carl Edwards, Attorney
Board of Tax Appeals
Docking State Office Building
915 S.W. Harrison
4th Floor
Topeka, KS 66612

/s/
Kerri S. Nelson

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

IN THE MATTER OF THE APPEAL OF
MARK DEAN GODDARD, FROM AN ORDER
OF THE DIRECTOR OF TAXATION
ON ASSESSMENT OF MARIJUANA
AND CONTROLLED SUBSTANCES TAX

AND Doc. No. 95-63903

IN THE MATTER OF THE APPEAL OF
ROBERT LEE FOSTER, FROM AN ORDER
OF THE DIRECTOR OF TAXATION
ON ASSESSMENT OF MARIJUANA
AND CONTROLLED SUBSTANCES TAX

APPELLANT'S MOTION FOR REHEARING AND MODIFICATION

COME NOW Appellants, Mark Dean Goddard and Robert Lee Foster, by and through counsel, Richard W. Parker, pursuant to Supreme Court Rule 7.05, and hereby request the Court to modify its Order dated July 24, 1995, dismissing Appellants' appeal for failure to file the required bond, and in support thereof state and allege as follows:

1. That on March 21, 1988 Mark Goddard and Robert Foster plead nolo contendere to the charge of attempted possession of cocaine and sale of cocaine.
2. That on July 15, 1988, and September 29, 1988, respectively, the Kansas Department of Revenue issued a "Notice of Assessment of Tax Upon Marijuana and a Controlled Substance" to Robert Foster and Mark Goddard in the amount of $1,144,460.00
3. That on April 23, 1992, a formal hearing was held by the Department of Revenue, and on September 15, 1992,

the Administrative Hearing Officer designated by the Director of Taxation, Jim Weisgerber, entered an order denying the Appeal of the taxpayers and upholding the assessment of the department.

4. That on October 12, 1992, the taxpayers filed a Notice of Appeal to the Board of Tax Appeals.
5. That on June 1, 1993, a prehearing conference was held, and on June 1, 1994, a formal hearing was conducted before the Board of Tax Appeals.
6. That on January 30, 1995, the Board of Tax Appeals entered an order affirming assessment of the tax by the Department of Revenue.
7. That on February 20, 1995, the taxpayers filed a Petition for Reconsideration which was denied by the Board of Tax Appeals in its order Reconsidering the Board's prior order of January 30, 1995.
8. That on April 7, 1995, the taxpayers filed their Notice of Appeal/Petition for Judicial Review in the Court of Appeals as well as their Motion for Waiver of Bond.
9. That on May 5, 1995, this Court denied Appellants' Motion for Waiver of Bond and instructed the parties to address the issue of an appropriate bond by written response.
10. That pursuant to this Court's orders of May 5, 1995 and May 18, 1995, Appellants filed their Suggestions in Support of Appellants' Motion to Waive Bond on June 21, 1995.
11. That on June 26, 1995, this Court denied Appellants' Motion to Waive Bond.
12. That Kansas Supreme Court Rule 9.03(b) provides that a statutory bond in the amount of 125% of the tax assessed shall be filed with the Clerk of the Appellate Courts unless otherwise requested.

13. That in the present matter, under Rule 9.03(b), the bond required to be posted by Appellants is $1,430,575.00.
14. That on July 24, 1995, this Court dismissed the present Appeal on the grounds that Appellants' had failed to post the required bond of $1,430,575.00. (See this Court's Order of July 24, 1995, marked Exhibit "A", attached hereto and incorporated by reference as if fully set forth herein).
15. That the instant appeal involves, in part, the constitutionality of the Marijuana and Controlled Substances Act, K.S.A. 79-5201 *et. seq.*
16. That the United States Supreme Court recently found Montana's Dangerous Drug Tax to be unconstitutional on the grounds that the tax assessment was so excessive that it constituted a punitive tax. *Department of Revenue of Montana v. Kurth Ranch, et al.*, 1994 W.L. 237615 (U.S.).
17. That similarly, in the present matter, Appellants contend that the Kansas Marijuana and Controlled Substances Act is unconstitutional under essentially the same analysis applied by the Supreme Court in *Kurth*, supra.
18. That the instant appeal is taken pursuant to K.S.A. 74-2426 which provides that an appeal from the Board of Tax Appeals must be taken to the Court of Appeals.
19. That Appellants raised the above constitutional issue before the Board of Tax Appeals, and the Board determined that the *Kurth*, supra, decision was not applicable the present matter as the Board of Tax Appeals is specifically prohibited from ruling on constitutional issues as stated in *Felton Truck Line v. State Board of Tax Appeals*, 183 Kan. 287, 293, 327 P.2d 836 (1958).
20. That K.S.A. 79-5205(c) provides that the tax penalties and interest assessed by the director of taxation are presumed to be valid and correctly determined and assessed.

21. That due to the fact that the Board of Tax Appeals is unable to determine the constitutionality of the Kansas Marijuana and Controlled Substances Act in order to overcome the presumption of the validity of the assessment, under K.S.A. 74-2426, the taxpayers had to appeal the instant matter to this Court.
22. That Appellants are financially unable to post the required bond of $1,430,475.00. (See Affidavits of Appellant Mark Goddard and Robert Foster, attached hereto as Exhibits "B" and "C", and incorporated by reference as if fully set forth herein).
23. That under Supreme Court Rule 9.03, this Court has discretion to modify the required bond.
24. That should the Court dismiss the instant appeal, Appellants will be denied the due process of law to which they are entitled under both the Kansas and the United States Constitutions as the only way they may seek judicial review of the subject tax assessment is by appeal to this Court.
25. That Appellants should not be denied their right to appeal based solely upon their extremely limited financial resources.
26. That the Department of Revenue seized approximately $10,000.00 cash from Appellants shortly before the subject assessment.
27. That Appellants request that the above amount serve as the bond necessary for purposes of appealing the tax assessment.
28. That in the alternative, Appellants respectfully request the Court to enter an Order setting bond in this matter at $5,000.00.

WHEREFORE, Appellants respectfully request this Court to enter an Order waiving a bond in the amount of

$1,430,575.00 in this appeal, and enter an Order permitting the $10,000.00 cash seized by the Department of Revenue to serve as the necessary bond for the present appeal. In the alternative, Appellants respectfully request the Court to enter an Order setting bond in this matter at $5,000.00, and for such other and further relief as the Court may deem just and equitable.

Richard W. Parker, P.A.

By: /s/

Richard W. Parker—#10470
7600 W. 110th St., Ste. 104
Overland Park, KS 66210
(913) 451-1980
ATTORNEY FOR APPELLANTS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Motion for Rehearing and Modification was served upon the following parties by depositing same in the U.S. Mail, postage prepaid, on this 2nd day of August, 1995:

Mr. Jack Shriver, Chairman
Board of Tax Appeals
Docking State Office Building
915 S.W. Harrison
4th Floor
Topeka, KS 66612

Director of Taxation
Docking State Office Building
915 S.W. Harrison
3rd Floor
Topeka, KS 66612

Brian Cox, Attorney
Legal Services Bureau
Kansas Dept. of Revenue
Docking State Office Building
915 S.W. Harrison
Topeka, KS 66612-1588

Mark Burghart
General Counsel
Dept. of Revenue
Docking State Office Building
915 S.W. Harrison
Topeka, KS 66212

Carl Edwards, Attorney
Board of Tax Appeals
Docking State Office Building
915 S.W. Harrison
4th Floor
Topeka, KS 66612

/s/
Richard W. Parker

EXHIBIT B

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

IN THE MATTER OF THE APPEAL OF
MARK DEAN GODDARD, FROM AN ORDER
OF THE DIRECTOR OF TAXATION
ON ASSESSMENT OF MARIJUANA
AND CONTROLLED SUBSTANCES TAX

AND Doc. No. 95-63903

IN THE MATTER OF THE APPEAL OF
ROBERT LEE FOSTER, FROM AN ORDER
OF THE DIRECTOR OF TAXATION
ON ASSESSMENT OF MARIJUANA
AND CONTROLLED SUBSTANCES TAX

AFFIDAVIT

The undersigned, Mark Dean Goddard, being of full age and first duly sworn on oath, states and deposes:

1. That Affiant is an appellant in the above-entitled matter.
2. That Affiant is employed as a building contractor.
3. That Affiant is financially unable to post a bond in the amount of $1,430,575.00 in order to perfect the present appeal.
4. That Affiant respectfully requests this Court to modify its Order dated July 24, 1995, dismissing the instant appeal.
5. That shortly before the subject assessment, the Department of Revenue seized approximately $10,000.00 from Affiant.
6. That Affiant respectfully requests this Court to enter an Order allowing the $10,000.00 cash previously seized by

the Department of Revenue to serve as the appropriate bond in this matter, or in the alternative, to set bond in this matter at $5,000.00.

7. Further, Affiant saith not.

/s/
Mark Dean Goddard, Affiant

SUBSCRIBED AND SWORN to before me this 2 day of August, 1995.

/s/
Notary Public

My appointment expires:
5-18-98

EXHIBIT C

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

IN THE MATTER OF THE APPEAL OF
MARK DEAN GODDARD, FROM AN ORDER
OF THE DIRECTOR OF TAXATION
ON ASSESSMENT OF MARIJUANA
AND CONTROLLED SUBSTANCES TAX

AND Doc. No. 95-63903

IN THE MATTER OF THE APPEAL OF
ROBERT LEE FOSTER, FROM AN ORDER
OF THE DIRECTOR OF TAXATION
ON ASSESSMENT OF MARIJUANA
AND CONTROLLED SUBSTANCES TAX

AFFIDAVIT

The undersigned, Robert Lee Foster, being of full age and first duly sworn on oath, states and deposes:

1. That Affiant is an appellant in the above-entitled matter.
2. That Affiant is employed as a truck driver.
3. That Affiant is financially unable to post a bond in the amount of $1,430,575.00 in order to perfect the present appeal.
4. That Affiant respectfully requests this Court to modify its Order dated July 24, 1995, dismissing the instant appeal.
5. That shortly before the subject assessment, the Department of Revenue seized approximately $10,000.00 from Affiant.
6. That Affiant respectfully requests this Court to enter an Order allowing the $10,000.00 cash previously seized by

the Department of Revenue to serve as the appropriate bond in this matter, or in the alternative, to set bond in this matter at $5,000.00.

7. Further, Affiant saith not.

/s/_____

Robert Lee Foster, Affiant

SUBSCRIBED AND SWORN to before me this 1 day of August, 1995.

/s/_____

Notary Public

My appointment expires:
5-18-98

COURT OF APPEALS ORDER DISTRICT CASE NO.

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

RICHARD W PARKER
7600 W 110TH ST SUITE 104
OVERLAND PARK KS 66210-2392

IN THE MATTER OF THE APPEAL OF
MARK DEAN GODDARD FROM NO. 95-73903-A
AN ORDER OF THE DIRECTOR OF TAXATION
ON ASSESSMENT OF MARIJUANA AND
CONTROLLED SUBSTANCES TAX
AND
IN THE MATTER OF THE APPEAL OF
ROBERT LEE FOSTER FROM AN
ORDER OF THE DIRECTOR OF TAXATION
ON ASSESSMENT OF MARIJUANA AND
CONTROLLED SUBSTANCES TAX

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

BOTA DOCKET NOS. 92-16575-DT AND 92-16576-DT

DATE: 07/24/95.

CAROL G. GREEN
CLERK

No. 95-73,903

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

In the Matter of the Appeal of Mark Dean Goddard, et al.

O R D E R

In the absence of a response to this court's order dated June 26, 1995, the appeal is hereby dismissed for appellants' failure to timely file a bond. See Kansas Supreme Court Rule 9.03(b).

DATED: July 24, 1995.

FOR THE COURT

/s/

EDWARD LARSON, Judge

IN THE COURT OF APPEALS OF THE STATE OF KANSAS
NO. 95-73903

IN THE MATTER OF THE APPEAL OF MARK DEAN GODDARD, FROM AN ORDER OF THE DIRECTOR OF TAXATION ON ASSESSMENT OF MARIJUANA AND CONTROLLED SUBSTANCES TAX
AND **Doc. No. 95-73903**
IN THE MATTER OF THE APPEAL OF ROBERT LEE FOSTER, FROM AN ORDER OF THE DIRECTOR OF TAXATION ON ASSESSMENT OF MARIJUANA AND CONTROLLED SUBSTANCES TAX

APPELLANT'S PETITION FOR REVIEW

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF KANSAS

RICHARD W. PARKER
KS Supreme Crt. $10470
7600 W. 110th St.
Suite 104
Overland Park, KS 66210
(913) 451-1980

Attorney for Appellants Mark Dean Goddard and Robert Lee Foster

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE APPEAL OF MARK DEAN GODDARD, FROM AN ORDER OF THE DIRECTOR OF TAXATION ON ASSESSMENT OF MARIJUANA AND CONTROLLED SUBSTANCES TAX

AND **Doc. No. 95-73903**

IN THE MATTER OF THE APPEAL OF ROBERT LEE FOSTER, FROM AN ORDER OF THE DIRECTOR OF TAXATION ON ASSESSMENT OF MARIJUANA AND CONTROLLED SUBSTANCES TAX

APPELLANTS' PETITION FOR REVIEW

COME NOW Appellants, Mark Goddard and Robert Foster, through counsel, Richard W. Parker, pursuant to Supreme Court Rule 8.03, and for their Petition for Review, state and allege as follows:

I. Prayer for Review/Relief Sought

Pursuant to Supreme Court Rule 8.03 and K.S.A. 60-2101(b), Appellants respectfully request the Court to review the Order entered by the Court of Appeals, dated July 24, 1995, dismissing the above-captioned appeal due to appellants' failure to file an appeal bond. The decision of the Court of Appeals raises for the first time the constitutional issue of whether Supreme Court Rule 9.03(b), which requires appellants to post an appeal bond in the amount of 125% of the tax assessment by the Director of Taxation, violates due process of law under the Kansas and the United States Constitutions. Pursuant to K.S.A. 60-2101(b), appellants respect-

II. Date of the Decision of the Court of Appeals

July 24, 1995

III. Statement of Issues

1) Was the Court of Appeals correct in denying Appellants' Motion for Waiver of Bond?

2) Does Supreme Court Rule 9.03 operate in connection with K.S.A. 79-5205(c) to deny due process of law to appellants by financial constraints?

3) Did the Court of Appeals err in dismissing the above-captioned matter for Appellants' failure to post an appeal bond?

IV. Statement of Facts

On March 21, 1988, appellants, Mark Goddard and Robert Foster plead nolo contendere to the charges of attempted possession of cocaine and sale of cocaine. On July 15, 1988, and September 29, 1988, the Kansas Department of Revenue issued a "Notice of Assessment of Tax Upon Marijuana and a Controlled Substance" to Robert Foster and Mark Goddard, respectively, in the amount of $1,144,460.00.

On April 23, 1992, a formal hearing was held by the Department of Revenue. On September 15, 1992, the Administrative Hearing Officer designated by the Director of Taxation, Jim Weisgerber, entered an order denying the Appeal of the taxpayers and upholding the assessment of the department.

On October 12, 1992, the taxpayers filed a Notice of appeal to the Board of Tax Appeals. On June 1, 1993, a prehearing conference was held and on June 1, 1994, a Formal Hearing was conducted in the above-entitled matter before the Board of Tax Appeals. On January 30, 1995, the Board of Tax Appeals entered an order affirming assessment of the tax by the Department of Revenue. On February 20, 1995,

the taxpayers filed a Petition for Reconsideration, which was denied by the Board of Tax Appeals in its Order Reconsidering the Board's prior Order of January 30, 1995. On April 7, 1995, the taxpayers filed their Notice of Appeal/Petition for Judicial Review in the Court of Appeals.

Kansas Supreme Court Rule 9.03(b) provides in pertinent part:

> The statutory bond shall accompany the notice of appeal and be filed with the clerk of the appellate courts. Unless otherwise requested, the bond shall be in the amount of 125% of the tax assessed and shall be approved by the clerk. If a bond in a lesser amount is requested, the appellant shall submit a motion pursuant to Rule 5.01 with the notice of appeal in lieu of the bond.

Rule 9.03(b), requires appellants to file a bond in the amount of $1,430,575.00 in order to appeal the subject assessment. On April 7, 1995, pursuant to Supreme Court Rule 5.01, appellants filed a Motion for Waiver of Bond. On May 5, 1995, the Court of Appeals denied appellants' Motion, and instructed the parties to address the issue of an appropriate bond by written response. (See Appellants' Appendix at p. 1, attached hereto and incorporated by reference as if fully set forth herein).

On June 21, 1995, appellants served their Suggestions in Support of Appellants' Motion to Waive bond. On June 26, 1995, the Court of Appeals entered an Order denying appellants' Motion to Waive Bond, and instructing appellants' to file the required bond within 10 days from the date of the Order. (See Appellants' Appendix at p. 2, attached hereto and incorporated by reference as if fully set forth herein).

On July 24, 1995, the Court of Appeals entered an Order dismissing the instant appeal on the grounds that appellants

had failed to file the required bond of $1,430,575.00. (See Appellants' Appendix at p. 3, attached hereto and incorporated by reference as if fully set forth herein).

V. Argument

Under Kansas law, the assessment of taxes, penalties and interest by the Director of Taxation is presumed to be correctly determined and assessed. K.S.A. 79-5205(c) provides, in pertinent part:

> The tax penalties and interest assessed by the director of taxation are presumed to be valid and correctly determined and assessed. The burden is upon the taxpayer to show their incorrectness or invalidity.

Therefore, under K.S.A. 79-5205, the burden of proving that the assessment is invalid falls squarely on the shoulders on appellants. Pursuant to K.S.A. 74-2426, a taxpayer aggrieved by a decision of the Board of Tax Appeals may file an appeal directly to the Court of Appeals. As previously mentioned, upon filing the Notice of Appeal to the Court of Appeals, Supreme Court Rule 9.03(b) requires that a bond be posted in the amount of 125% of the tax assessed. In the present matter, in order to appeal the assessment, presumed to be valid as stated in K.S.A. 79-5205(c), under Rule 9.03(b), appellants would have to post a bond in the amount of $1,430,575.00.

The reality of the present situation is that a tax of over $1 million has been assessed against each appellant. Under Kansas law, the tax is presumed to be valid and correctly assessed. In order to overcome the presumption and challenge the assessment, appellants must file an appeal in the Court of Appeals. However, the only way appellants may perfect the appeal is by first posting a bond over $1.4 million, which appellants are simply financially unable to do. In short,

K.S.A. 74-2426, which allows a taxpayer aggrieved by a decision of the Board of Tax Appeals to file an appeal directly to the Court of Appeals offers little more than false hope of justice.

In addition, the instant appeal involves, in part, the constitutionality of the Marijuana and Controlled Substances Act, K.S.A. 79-5201 *et. seq.*, in view of the U.S. Supreme Court's recent decision in *Department of Revenue of Montana v. Kurth Rance, et al.*, 1994 W.L. 237615 (U.S.).

In *Kurth*, the Court struck down Montana's Dangerous Drug Tax on the grounds that the assessment was so excessive that it constituted a punitive "tax". Similarly, in the present matter, appellants contend that the Kansas Marijuana and Controlled Substances Act, like Montana's Dangerous Drug Tax, violates the 5th and 14th Amendments to the United States constitution, and under *Kurth*, supra, the assessment regime under the Act is prohibited by double jeopardy, res judicata and collateral estoppel.

The Board of Tax Appeals refused to apply *Kurth*, supra, noting that the Board is specifically prohibited from ruling on constitutional issues as stated in *Felton Truck Line v. State Board of Tax Appeals*, 183 Kan. 287, 293, 327 P.2d 836 (1958). The Board went on to note that should it decide to apply *Kurth*, supra, it would have to find that Article 52, of Chapter 79 of the Kansas Statutes Annotated is unconstitutional, which under long-standing Kansas law, it is specifically prohibited from doing.

The Board of Tax Appeals is legally precluded from determining the constitutionality of the Kansas Marijuana and Controlled Substances Act. In order to overcome the presumption created in K.S.A. 79-5205(c) that the tax assessment by the Director of Taxation is correct, under the appellate procedure specified in K.S.A. 74-2426, appellants had no al-

ternative but to file the instant appeal with the Court of Appeals. However, in order for the appellants to have their constitutional question heard by the only authority that can decide it, they must pay over One Million Dollars ($1,000,000.00)! It would appear that there is a price for justice, and a rather high one at that! Only rich Americans can afford this justice. The appellants cannot afford it. They are being denied due process and equal protection of the law as guaranteed by the Kansas Constitution and the U.S. Constitution.

Appellant Robert Foster is employed as an over-the-road truck driver, and appellant Robert Foster is employed as a building contractor. Given appellants' occupations, they are simply unable to pay in excess of $1.4 million as a bond in order to appeal the findings of the Board of Tax Appeals.

Taking into consideration the fact that appellants have the burden of proving that the assessment of the subject excise tax is invalid, coupled with the fact that under Kansas law an appeal of this constitutional issue must be made to the Court of Appeals, requiring appellants to pay over $1.4 million to perfect this Appeal certainly is a denial of due process and in direct violation of the Kansas and United States Constitutions.

Somewhat akin to criminal law, the presumption under K.S.A. 79-5205(c) is one of "guilty" unless the taxpayer is able to prove his "innocence". Requiring appellants to pay well over a million dollars in order to defend their innocence deprives these taxpayers of the due process of law to which they are entitled under both the Kansas and the United States Constitutions. In addition, denying appellants the right to appeal the constitutionality of the Kansas Marijuana and Controlled Substances Act merely because of the taxpayers inability to post the bond would cause irreversible harm.

Under Rule 9.03(b), the Court of Appeals has discretion to modify the required bond. As discussed at length in appellants' Suggestions in Support of Appellants' Motion to Waive Bond, shortly before the subject assessment, the Department of Revenue seized approximately $10,000.00 cash from appellants. Balancing the extremely limited financial resources of appellants against appellants' constitutional rights to appeal, suggests that the $10,000.00 could appropriately serve as the required appeal bond in this matter, or in the alternative, a bond could be set within the financial means of appellants. As previously suggested, a bond in this matter, or in the alternative, a bond could be set within the financial means of appellants. As previously suggested, a bond in the amount of $5,000.00 would be reasonable given the financial restraints of appellants.

To require an appeal bond in a larger amount would serve only to deny the taxpayers the constitutionally guaranteed due process of law to which they are entitled.

As the decision of the Court of Appeals, reflected in its Order dated July 24, 1995, raised for the first time the constitutionality of Supreme Court Rule 9.03(b), under K.S.A. 60-2101(b), appellants respectfully request this Court to enter an Order permitting review of the issues raised herein.

The chilling reality brought to light by the instant matter is that judicial review under Rule 9.03(b) is available only at a certain price, and at the cost of due process of law.

WHEREFORE, appellants respectfully request this Court to enter an Order granting review of the Order of the Court of Appeals dismissing the instant appeal for appellants'

failure to post bond, and for such other and further relief as the Court may deem to be just and equitable.

Richard W. Parker, P.A.

By: /s/

Richard W. Parker KS #10470
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Overland Park, KS 66210
(913) 451-1980
ATTORNEY FOR APPELLANTS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Petition for Review was served upon the following parties by depositing same in the U.S. Mail, postage prepaid, on this 22nd day of August, 1995:

Mr. Jack Shriver, Chairman
Board of Tax Appeals
915 S.W. Harrison
4th Floor
Topeka, KS 66612

Director of Taxation
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/s/
Richard W. Parker

APPELLANTS' APPENDIX

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No. 95-73,903

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Appeal of Mark Dean Goddard, et al.

ORDER

Appellants' motion to waive bond is denied on present showing. The parties are ordered to address the issue of an appropriate bond by written responses to be served and filed on or before May 22, 1995. Appellants' failure to respond will result in dismissal of the appeal without further notice.

DATED: May 5, 1995.

FOR THE COURT

/s/

J. P. BRAZIL, Judge

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

RICHARD W PARKER
7600 W 110TH ST SUITE 104
OVERLAND PARK KS 66210-2392

IN THE MATTER OF THE APPEAL OF
MARK DEAN GODDARD, FROM AN ORDER
OF THE DIRECTOR OF TAXATION
ON ASSESSMENT OF MARIJUANA
AND CONTROLLED SUBSTANCES TAX

AND Doc. No. 95-73903-A

IN THE MATTER OF THE APPEAL OF
ROBERT LEE FOSTER, FROM AN ORDER
OF THE DIRECTOR OF TAXATION
ON ASSESSMENT OF MARIJUANA
AND CONTROLLED SUBSTANCES TAX

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

RESPONSES TO COURT ORDER.
MOTION TO WAIVE BOND DENIED. APPELLANT'S HAVE 10 DAYS TO FILE THE REQUIRED BOND.

BOTA DOCKET NOS. 92-16575-DT AND 92-16576-DT
DATE: 06/26/95.

CAROL G. GREEN
CLERK

No. 95-73,903

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

In the Matter of the Appeal of Mark Dean Goddard, et al.

O R D E R

In the absence of a response to this court's order dated June 26, 1995, the appeal is hereby dismissed for appellants' failure to timely file a bond. See Kansas Supreme Court Rule 9.03(b).

DATED: July 24, 1995.

FOR THE COURT

/s/_____

EDWARD LARSON, Judge